Supreme Court, U.S.
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No.: 91-31

IN THE

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

-against-

GIUSEPPE GAMBINO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR GIUSEPPE GAMBINO IN OPPOSITION

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QUESTION PRESENTED

1. Whether respondent's 1981 acquittal on a heroin importation conspiracy charge, which covered a period of eight months, bars prosecution under the double jeopardy clause of the Constitution, of broadened charges of conspiracies to import and distribute narcotics when the latter conspiracies have subsumed the former and the conduct proved in the first prosecution will be used to prove the essential element of "an agreement" in the latter prosecution.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a-14a) is reported at 920 F.2d 1108. The decision of the District Court (Pet.App. 15a-58a) is reported at 729 F.Supp. 9541.[1]

1. References in parentheses refer to the appropriate pages of petitioner's appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1990. The petition for rehearing was denied on February 1, 1991. On April 22, 1991, Justice Marshall extended petitioner's time for filing its writ of certiorari until July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. On August 30, 1989 the respondent Gambino was charged in six counts of a sixth superseding indictment (6S 88 Cr. 919 PKL) which alleged, *inter alia,* various violations of the narcotics laws. Count One charged that Gambino participated in a conspiracy to import narcotics in violation of 21 U.S.C. §963. Count Two charged that the same activities also amounted to a conspiracy to possess narcotics with an intent to distribute it in violation of 21 U.S.C. §846. Count Three, which incorporated Counts One and Two, alleged that Gambino engaged in a continuing narcotic enterprise in violation of 21 U.S.C. §848(a) and (b). Count Five alleged that the respondent participated in a March 15, 1988 sale of heroin in violation of 21 U.S.C. §841(a)(1) and (2). Count Six charged that he obstructed justice in connection with the testimony of a former co-defendant in violation of 18 U.S.C. §1503. Finally, Count Seven alleged that these crimes together with various travel act violations constituted a pattern of racketeering activity in violation of 18 U.S.C. §1962 ("RICO").

More particularly, the narcotics importation and distribution conspiracies (Counts One and Two) alleged that the importation conspiracy commenced in January, 1975, when unindicted co-conspirators Filippo Ragusa and

Filippo Ricupa "smuggled in excess of $100,000 in United States currency from the United States to Sicily, Italy." (Indictment at 9) Thereafter, the indictment makes the following allegations:

* * *

"In or about February, 1980, Filippo Ragusa and Filippo Ricupa smuggled in excess of $250,000 from the United States to Sicily, Italy.

In or about March, 1980, in Milan, Italy, Filippo Ragusa requested Filippo Ricupa to assist Ragusa and his associates in smuggling a quantity of heroin, secreted in a suitcase, into the United States from Milan, Italy.

On or about March 9, 1980, Giuseppe Gambino and Emanuele Adamita met with Frank Rolli at the Cafe Mille Luci on 18th Avenue in Brooklyn, New York.

On or about March 11, 1980, Giuseppe Gambino and Emanuele Adamita met with Frank Rolli in the Villa Borghese Restaurant in Brooklyn, New York.

On or about March 14, 1980, Emanuele Adamita and Frank Rolli traveled from New York City to Milan, Italy.

* * *

On or about March 15, 1980, Emanuele Adamita, Filippo Adamita and Filippo Rieupa, among others, met at the II Vecchio 400 Restaurant in Milan, Italy.

On or about March 18, 1980, Emanuele Adamita, and co-conspirators Antonio Adamita

> and Domenico Adamita delivered 40.61 kilograms of heroin, secreted in zinc containers, to Jumbo Freight Forwarding in Milan, Italy for shipment to "Centro Nastri Italian Distributors on 18th Avenue in Brooklyn, New York." (Indictment 9-10)

2. The above-described allegations which formed the linch-pin of the government's 1989 conspiracy charges were remarkably familiar to Mr. Gambino. In March of 1981, Mr. Gambino was tried and acquitted in the case of *United States v. Giuseppe Gambino, et al.,* 80-CR-131 (E.D.N.Y.). The indictment in that case alleged:

> From on or about August 1, 1979 until March 18, 1980, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Rosario Gambino, Giuseppe Gambino, Emanuele Adamita, Antonio Adamita, Luigi LoBue, Salvatore Gallina, Giuseppe Vallelunga, Fortunato Inzone, Antonio Silvestrini and Paul Zinerco, together with others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.
>
> 1. It was part of said conspiracy that the defendants and others would import into the United States from places outside thereof large quantities of heroin, a Schedule 1 narcotic drug controlled substance.
>
> 2. It was further part of said conspiracy that the defendant would conceal the existence of the conspiracy and would take steps designed to

prevent disclosure of their activities. (Title 21, United States Code, Section 846).

(Appendix in Court of Appeals) (A: 117-18)

Although the indictment in the earlier prosecution is vague, the proof at that trial, as demonstrated by the government's opening statement, makes it unequivocally clear that the allegations in the 1989 indictment are the same allegations for which Mr. Gambino stood trial in 1981:

> [T]he Government will prove the following:
>
> The evidence you will hear in this case will show the existence of a scheme, a plan, a conspiracy, if you will, to import over 40 kilograms or about 90 pounds of nearly pure heroin, with a wholesale value of approximately ten million dollars in the United States, from Italy into the United States.
>
> The evidence will also show, ladies and gentlemen, that this scheme was supervised, directed and financed by the defendant sitting at that table, Giuseppe Gambino.
>
> Ladies and gentlemen, you will have the opportunity in this case to hear how this plan was hatched, how it developed and how it ultimately failed, when those 40 grams of heroin were seized by the Italian National Police near Milan, Italy, on March 18, 1980. And you will get this insider's view, ladies and gentlemen, of this international narcotics conspiracy because during the time that the conspiracy was unfolding one of its central figures was an Italian Airlines employee name [sic] Frank Rolli.

* * *

Now, the evidence you will hear begins to unfold on March 3, 1980 when Rolli was on duty performing his duties as a cargo agent at the cargo facility at Alitalia Airlines at John F. Kennedy Airport. And on that day Frank Rolli received a telephone call from an individual known to him as Emmanuel Adamita.

* * *

And Adamita suggested to Rolli during that telephone call that they meet later on that day, and that is March 3rd.

* * *

Now, March 3rd was a Monday and some time later during that week, that is the week of March 3rd, Adamita again called Rolli at work and he confirmed a meeting for Sunday, March the 9th at the Cafe Mille Luci.

On Sunday, March 9, Rolli proceeded to the Cafe Mille Luci around noontime and he was again accompanied by and kept under surveillance by agents of the Drug Enforcement Administration. And when he arrived at the Cafe Mille Luci and went inside, Adamita was waiting for him. And Adamita said that they were waiting for someone. So he and Adamita chatted for a few minutes. And after a few minutes the defendant Giuseppe Gambino entered the Cafe Mille Luci and approached the table where Adamita and

Rolli were sitting, and Adamita introduced Giuseppe Gambino to Frank Rolli as Joe. And Joe suggested that there were too many people in the Cafe Mille Luci and that they go somewhere else to talk.

So they went to a diner on Kings Highway in Brooklyn, which you will hear was the Del Rio Diner.

They went in several cars. Rolli went in his own car and Adamita and the defendant Gambino followed in the defendant Gambino's car.

And once there Adamita told Rolli to repeat to Joe what Rolli had told him the previous Monday about how the heroin should be packaged and shipped from Italy to New York.

And Rolli, repeated in essence what he had said, and he described the commercial shipment, how it should be packaged, how it should be labeled and what should go in the boxes and the fact that they needed legitimate invoices to accompany the boxes.

* * *

So they left it at the end of the meeting, ladies and gentlemen that Rolli would be contacted by Adamita within a few days.

And sure enough, ladies and gentlemen, on Tuesday, March 11th Adamita again called Rolli

at his place of work and another meeting at the Cafe Mille Luci was set for that evening.

At approximately 8:00 p.m. Rolli arrived at the Cafe Mille Luci, and met with Adamita and again Rolli was being surveilled by agents of the drug enforcement administration. And Rolli and Adamita, after a few minutes left the Mille Luci and went to the Villa Borghese Restaurant which is on Bath Avenue in Brooklyn. And at the Villa Borghese Restaurant the defendant Giuseppe Gambino was waiting for them inside the restaurant and they had dinner. At this meeting, ladies and gentlemen, you will hear that the plans for the trip by Rolli and Adamita to Milano was finalized.

The defendant Joe Gambino agreed to pay Rolli the $30,000 he had asked for. And he told Adamita to come to his place in New Jersey the next day and to get money to give Rolli as an advance payment.

The defendant Gambino told Rolli and Adamita that they were going to make the shipment as large as possible and that Adamita would be contacted in Milan as to the exact amount of the shipment, but that it would be at least eight to ten kilos.

And finally, ladies and gentlemen, among other things they finalized their departure date for Friday, March 14, 1980.

* * *

And that on that same evening he and Adamita got on an Alitalia Airlines flight and flew to Milan together.

* * *

And later that Saturday, March 15th Rolli registered in the Hotel Astoria, which is located in another small town near Milan named Busto Arsizio.

And about 11:00 p.m. that evening Emmanuel and Antonio Adamita came to Rolli's hotel and they brought to Rolli the unexpected news that rather than eight to ten kilo shipment, they expected the shipment was in fact to be forty kilos of heroin. And Emanuel Adamita told Rolli that he had learned that news at a meeting he had attended that evening in Milan in a restaurant.

* * *

And later on that Monday evening they began to weld the heroin which had been delivered to Antonio Adamita's garage in forty-two separate packages. They began rolling the heroin and placing it in the containers and welding the containers shut. And they soon discovered that they didn't have enough room in the two containers that they purchased earlier that day to package all the heroin. So they suspended operations for that evening, and the following morning they went out and they bought another smaller container in which the rest of the heroin

was to be placed. And they also went back to the record store that they visited the day before and bought a large number of record albums and music tapes, cassettes or eight track tapes that were to be put in with the shipment.

They then returned to Antonio Adamita's garage where they completed welding the heroin in the now three containers and they packed four boxes.

Though the boxes you will hear, ladies and gentlemen, contained the metal containers with the lids welded on top, inside a box. Inside another box and between the two boxes were placed pieces of styrofoam and the record albums. And there was a top on the box. And the boxes were addressed to Centro Nostra Italian Distributors, which is located at 7414 18th Avenue in Brooklyn, New York.

Now, the fourth box, ladies and gentlemen, which was smaller than the other three, contained only record albums. And this was the box, ladies and gentlemen, that Rolli had earlier indicated was the one that was to be presented to Customs. And it was also smaller so that it could be immediately identified from the other three.

And then Antonio Adamita and Frank Rolli loaded these boxes in a truck and they took them to Jumbo Freight Forwarders, which is located in a small town again near Milan, named Gallarate (phonetic).

> And they gave the shipment to the Jumbo Freight Forwarders. They paid for its transport to New York. And they returned to Antonio Adamita's house to celebrate.
>
> (Court of Appeals Appendix 119-134).

3. Prior to trial, Gambino moved to dismiss the first three counts of the indictment and to bar proof that he participated in a 1980 plan to import and distribute heroin from Milan, Italy (6a 229-329). Though the District Court (Leisure, J.) granted Gambino's motion to bar proof on collateral estoppel grounds that he conspired to import heroin in 1980, it denied the defendant's motion in all other respects including his claims under the double jeopardy clause (35a-37a). Gambino, pursuant to *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034 (1977), appealed to the United States Court of Appeals for the Second Circuit.

On December 10, 1990, a panel of the Second Circuit held that *Grady v. Corbin,* _____U.S._____ , 110 S.Ct. 2084 (1990), and the double jeopardy provisions of the Fifth Amendment of the Constitution barred prosecution of Gambino on Counts One and Two but not on Counts Three (CCE) and Seven (RICO).[2] The court directed that "upon remand, the district court shall consider whether to dismiss, with leave to re-present Counts One and Two of the indictment or to order

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2. Gambino has filed a petition for writ of certiorari as to that aspect of the Second Circuit's decision which declined to bar prosecution of the counts of his indictment under 21 U.S.C. §848 and 18 U.S.C. §1962. That petition is presently pending before this Court No. 90-1689.

redaction of the offending portions of the indictment." *United States v. Gambino,* 920 F.2d 1108, 1114 (2d Cir. 1990); (16a).

Gambino sought rehearing *en banc* solely with regard to the court's decision permitting prosecution of him on Count Three and the admission of evidence of the 1980 importation on Counts Three and Seven. The government filed a cross petition, challenging the court's conclusion that consideration of prior jeopardy compelled dismissal or re-presentation of Counts One and Two. The cross petitions were denied.

In reaching its conclusion that Counts One and Two should be barred as pleaded, the court below relied on *Grady v. Corbin,* _____U.S._____ , 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) which the Court of Appeals believed "significantly altered the jurisprudential landscape of double jeopardy." Applying the holding of *Grady* to conspiracy cases as well as to single-act offenses, the court below held that the double jeopardy clause bars a subsequent prosecution "if, *to establish an essential element* of an offense charged in that prosecution, the government *will prove conduct* that constitutes an offense of which the defendant has already been prosecuted." 110 S.Ct. at 2087 (emphasis supplied). The court below, citing *United States v. Calderone,* 917 F.2d 717, 721 (2d Cir. 1990) reasoned that "the conduct that constitutes an offense in a conspiracy prosecution" is that conduct from which the jury may infer the existence of an agreement.

Relying on *Grady,* the court below therefore found that Gambino's "conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from

the first crime only in that the indictment happens to describe it differently." *Calderone* at 721, quoting *Grady.*

The court below concluded that, because Counts One and Two rest, at least partially, on overt acts for which respondent had been previously prosecuted, they may not remain in the indictment against him. The Court ordered that upon remand, the District Court should consider whether to dismiss, with leave to re-present, Counts One and Two of the indictment or to order redaction of the offending portions of the indictment.

ARGUMENT

1. *Grady v. Corbin,* _____U.S._____, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), a case which "significantly altered the jurisprudential landscape of the double jeopardy clause" of the Fifth Amendment to the Constitution, mandates that the government's petition be denied. In *Grady,* this Court supplemented the traditional test of double jeopardy announced in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932) by adding a "same conduct" rule. This test "bars a subsequent prosecution if *to establish* an essential element of an offense charged in that prosecution, the government will prove *conduct* that constitutes an offense for which the defendant has already been prosecuted." 110 S.Ct. at 2087.

Application of *Grady* to the instant prosecution compels the conclusion that Counts One and Two of Gambino's indictment as presently constituted should be dismissed. Here the government seeks to use Gambino's *conduct* from August 1, 1979 to March 18, 1980, a critical time frame in the prior prosecution, to establish Gambino's participation in the conspiracies charged in

Counts One and Two. That is, they are using his conduct to establish his agreement (an essential element of this prosecution) to import and possess with intent to distribute narcotics. Here, as in *Grady,* the government has admitted it will attempt to prove conduct -- the acts underlying a conspiracy to import narcotics -- for which Gambino has already been prosecuted in order to establish the conspiratorial agreement necessary for a conviction. Here, as in *Grady,* the government, if it chose, could have indicted Gambino without relying on conduct for which Gambino had previously been prosecuted by, for example, omitting from its grand jury presentation that conduct which was the subject matter of his 1981 acquittal.[3]

2. The heart of the government's position is that *Grady* should not be applied to successive conspiracy prosecutions. The government's attempt to limit *Grady* to its facts is flawed for two reasons: first, it improperly narrows the scope of this Court's decision, and, second, it mischaracterizes the nature of the essential elements necessary to convict for conspiracy (See pet.br. p. 7).

Nothing in the *Grady* opinion suggests that it is a response to a relatively limited number of cases. Instead, as the Second Circuit has noted in *United States v. Calderone,* 917 F.2d at 721, the opinion was concerned with the dangers of multiple trials and the inadequacy of the *Blockburger* test to guard against these dangers. Moreover, as the *Calderone* court observed, *Grady*'s '"same conduct' test is described in inconclusive generally

3. Indeed, petitioner concedes that Gambino's conduct in 1979 and 1980 deals with only two of 41 overt acts in his present prosecution. While this conduct is critically important, its omission would not sound a death knell to the prosecution's case.

applicable terms throughout the opinion.... Indeed the opinion is structured so that it first declares a general rule and then applies that rule to the facts of the case." *Id.* at 721 (citations omitted)

According to the petitioner, the "conduct that constitutes an offense" in conspiracy cases is "the agreement or confederation of the conspirators to commit one or more unlawful acts," (pet.br. p. 7 citing ***Braverman v. United States,*** 317 U.S. 4, 53 (1942)), rather than the specific conduct from which the agreement can be inferred. Therefore, it claims, it will not establish an essential element of the later prosecution by proving the conduct of Gambino in the conspiracy for which he was previously acquitted.

The petitioner is incorrect for a number of reasons. First, as the Second Circuit noted in *Calderone,* the government may not reprosecute an "agreement" simply by describing it differently:

> To begin with, the "agreement" in nearly all conspiracy prosecutions is not proved directly, such as by testimony of conspirators that "we agreed to sell narcotics." Rather, the "agreement" is simply alleged, and to prove its existence the government presents evidence of the conspirators' conduct -- what they said and did -- and asks the jury to infer from this conduct that the criminal agreement has been established. The conduct in most conspiracy cases, as was the conduct in *Adamita,* is the focus of the case. Under *Grady,* this conduct may not be prosecuted a second

> time in order to establish an "agreement" that differs from the first crime only in that the indictment happens to describe it differently.

Second, in *Grady* Justice Brennan was careful to define "an essential element of an offense" in terms of "*conduct* that constitutes an offense for which the defendant has already been prosecuted." The court specifically excluded "'actual evidence' or the 'same evidence'" 110 S.Ct. at 2093. In short, here and in *United States v. Felix,* 926 F.2d 1522 (10th Cir. 1991) *cert. pending* No. 90-159, the petitioner seeks an abrogation of *Grady*'s "same conduct" test and the adoption of a "same evidence" test *under Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180 (1932). See *Grady,* 110 S.Ct. at 2093, fn.12.

Third, if the petitioner's position were adopted, the government could, if it chose, prosecute individuals for conspiracy, fail in its attempt, and reprosecute for the same conspiracy by simply recasting "the agreement" but relying on the same conduct to infer the new agreement. *See Green v. United States,* 355 U.S. 184, 187-188, 78 S.Ct. 221, 223-224 (1957) and *United States v. Abbamonte,* 759 F.2d 1065, 1068 (2d Cir. 1985) and cases cited therein.

3. The government requests that its petition be granted to the extent of holding it pending action in *United States v. Felix,* No. 90-1599. Though respondent believes that it would be appropriate for this Court to affirm the decision of the Court of Appeals for the Tenth Circuit in *United States v. Felix, supra,* we also believe that it would be inappropriate to hold this petition pending action on the government's petition for a writ of certiorari in that case. *Felix* is factually distinguishable (See Govt's Petition for Certiorari in *United States v. Felix,* at pp. 2-4).

In *Felix*, the defendant was first prosecuted and convicted for the substantive offense of attempting to manufacture methamphetamine in August, 1987. Thereafter, he was prosecuted for conspiracy to violate the narcotics laws and seven substantive narcotics offenses *excluding* his prior attempt conviction. In this case, the issues are much more limited and involve successive conspiracy prosecutions where the conduct used to infer the essential element of an agreement is precisely the same in both prosecutions. On the other hand, the relevant conduct in *Felix* was an attempt with successive substantive offenses. Thus, unlike the instant case, *Felix* is concerned with the principles of collateral estoppel as indicated in *Ashe v. Swenson*, 397 U.S. 436 (1970) and that decision's interrelationship to *Grady*. *See Dowling v. United States*, 110 U.S. 6 (1990). This petition, however, concerns only the application of *Grady* to successive conspiracy prosecutions.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
August 16, 1991

Respectfully submitted,

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